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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-127

ROLF TOPIK, HENRY MOSKOWITZ, STANLEY SCHWARTZ, MARY JOHNSON, RICHARD SMITH and CHRISTINA SMITH, individually and on behalf of all other holders of freely tradeable common stock of ELECTRONIC AIDS, INC., a Maryland corporation,

Petitioners,

v.

CATALYST RESEARCH CORPORATION, MINE SAFETY APPLIANCES COMPANY, MILTON G. HULME, JR., GEORGE H. DEIKE, JR., JOHN W. CARVILLE, EUGENE W. MERRY, JOHN T. RYAN, JR., and ELECTRONIC AIDS, INC., a Maryland corporation,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION and APPENDIX

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BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

An opinion filed March 22, 1972 by the District Court for the District of Maryland denying motions by the individual defendants to dismiss for lack of jurisdiction of their persons is reported in 339 F. Supp. 1102. The oral opinion delivered March 23, 1972 by the District Court accompanying his order entering summary judgment in favor of all the defendants, unreported, appears in petitioners' appendix, pp. B4-B9. The opinion of the Court of Appeals for the Fourth Circuit affirming the District Court, noted in 473 F.2d 907, is not reported. A copy is printed in petitioners' appendix, pp. B1-B2.

JURISDICTION

The judgment of the Court of Appeals was entered on February 6, 1973. A petition for rehearing filed February 21, 1973 by petitioners, appellants below, was denied March 1, 1973 by an order, a copy of which is printed in respondents' appendix, p. 1a. Petitioners' suggestion for rehearing en banc (contained in their petition for rehearing) was denied on March 16, 1973.

A petition for rehearing suspends the finality of the judgment of the Court of Appeals (F.R.A.P. 41(a)), but a suggestion for rehearing en banc does not (F.R. A.P. 35(c)). The ninety-day period within which petitioners were required to petition for certiorari (28 U.S.C. § 2101(c)) and within which they were required to apply for any extension they needed (Supreme Court Rule 32 2) therefore began to run upon the denial of the petition for rehearing on March 1, 1973, and it accordingly expired on May 30, 1973. Petitioners' application for extension of the ninety-day period, filed June 9, 1973, was therefore untimely, and the Court's order granting it was improvident. The Court lacks jurisdiction to entertain the petition for certiorari.

Question Presented.

STATUTE INVOLVED

The pertinent provisions of the General Corporation Law of Maryland, article 23 of the Maryland Code, section 73, are set forth in the oral opinion of the District Court, petitioners' appendix p. B4 at p. B6.

QUESTION PRESENTED

Where petitioners first questioned the constitutionality of F.R.C.P. 56, authorizing summary judgments, in the Court of Appeals, after the District Court had granted defendants' motion for summary judgment, and had denied plaintiffs' (petitioners') motion for partial summary judgment, can the constitutionality of F.R.C.P. 56 properly be raised on certiorari?

STATEMENT OF THE CASE

The complaint filed by petitioners in the District Court on October 28, 1970 was in two counts. The first was a class claim on behalf of certain stockholders of Electronic Aids, Inc., a former Maryland corporation, alleging that they had not received sufficient stock upon the merger of their corporation into a Delaware corporation of the same name. The District Court held they were barred from relief by their failure to comply with the Maryland statute governing appraisal rights of stockholders dissenting from a merger.

The second count of the complaint was a derivative class claim on behalf of all the stockholders of Electronic Aids, the former Maryland corporation, against its majority stockholder, Catalyst Research Corporation, Mine Safety Appliances Company, a Pennsylvania Corporation, the majority stockholder of Catalyst, and certain common officers and directors charging them with breach of their fiduciary duty toward Electronic Aids by authorizing interest-bearing loans from Catalyst to Electronic Aids in alleged violation of a written agreement to provide Electronic Aids with interest-free working capital. The District Court held that the agreement did not require Catalyst to provide interest-free capital to Electronic Aids and that plaintiffs had not offered to prove that the rates of interest charged from time to time were higher than any interest rate Electronic Aids could have obtained elsewhere.

ARGUMENT

I. Petitioners Have Admitted They Are Not Entitled To Certiorari.

In their application for extension of time to petition for certiorari, petitioners refer to two other cases being handled by their counsel, stating (p. 2): "Realistically, it is believed that no one of the cases, standing alone, would receive a grant of certiorari." Their petition contains the same admission (p. 16): "Looked at in isolation, each of the companion petitions for certiorari would stand a good chance of being denied as involving matters not sufficiently consequential."

No enlightenment is offered to show how a case lacking merit is rendered meritorious when it is considered in conjunction with two other cases also lacking merit. Zero plus zero plus zero can never equal more than zero.

II. Petitioners Have Waived Their Right To Question The Constitutionality Of F.R.C.P. 56 Permitting Summary Judgments.

The only question presented by petitioners' statement of the questions presented (Petition, p. 4) insofar as they apply to the present case is the constitutionality of summary judgments in the federal courts. This question was raised for the first time in the Court of Appeals.

It is hornbook law that issues not raised in the trial court will not be considered on appeal. A litigant who fails to question the constitutionality of a statute or administrative order below is held to have waived his right to do so later.

> *Curtis Publishing Co. v. Butts,* 388 U.S. 130 (1967).
>
> *Duignan v. United States,* 274 U.S. 195 (1927).
>
> *Dayton-Goose Creek R. Co. v. United States,* 263 U.S. 456 (1924).

In the case at bar petitioners not only did not question the District Court's power to grant summary judgment, but themselves on March 7, 1972 moved for a partial summary judgment in their favor (Appx. in Ct. of App. pp. 38-9). One of the affidavits attached to their motion, that of Morris Tischler, is alluded to in the opinion of the District Court (Pet. Appx. p. B7).

Petitioners seek a trial in order to offer parol evidence concerning an agreement made September 4, 1970 (Pet. Appx. p. B4) between petitioner Topik and respondent Catalyst which the courts below have found to

be complete and unambiguous. Not only do petitioners not point to any provision of the agreement which they claim is ambiguous, but they nowhere state what parol evidence they would offer to support their claim that the agreement means anything other than what it says. This omission is not the result of oversight. Plaintiff Topik expressly admitted on deposition that there were no agreements between the parties not contained in the writing (Resp. Appx. p. 3a). He made no claim that petitioners exchanged their appraisal rights for the right to bring a plenary suit.

The testimony of petitioners' counsel, Mr. Joy, on deposition was to the same effect, but even more positive. He testified (Resp. Appx. p. 4a) that on September 4, 1970 at the execution of the agreement his co-counsel, Isaac Neuberger, Esquire, expressly announced "that he wanted it to be very well understood that this would not be barring anybody from their rights under the Maryland statute." Mr. Joy said (Resp. Appx. p. 4a) that he "came away from the meeting with the belief that the status quo had been preserved . . ." Under the status quo, the only right his clients had was that given by the Maryland appraisal statute The preservation of the status quo did not create in them a new right to bring a plenary suit.

Thus it is clear that when the parties entered into the agreement of September 4, 1970, they not only had the Maryland appraisal statute well in mind but they also recognized that it was applicable and available to any stockholder, and that the agreement neither increased nor diminished their rights in this respect. Not

a word of evidence has been offered by petitioners that any one ever mentioned, or that Catalyst even considered, waiving it.

Petitioners accordingly have no basis for their claim that they have been denied their day in court. If they were to be given a day in the courtroom, there would be nothing they could say.

In substance, petitioners seek to abolish summary judgments, so that any litigant would be free to voice his contentions orally in court regardless of their relevance to the issues. To permit this would be to turn every federal courtroom into an indoor Hyde Park. While Hyde Park may be a desirable appendage of the democratic form of government, it is not an appropriate part of the common law judicial system.

CONCLUSION

For the foregoing reasons the petition for certiorari filed July 16, 1973 to review the judgment of the United States Court of Appeals for the Fourth Circuit entered February 6, 1973, which became final on March 1, 1973, should be denied.

Respectfully submitted,

EDMUND K. TRENT
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RESPONDENTS' APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ROLF TOPIK, HENRY MOSKOWITZ, STANLEY SCHWARTZ, MARY JOHNSON, RICHARD and CHRISTINA SMITH, individually and in behalf of all other Holders of Freely Tradeable Common Stock of the Electronic Aids, Inc., a Maryland Corporation, Appellants,

v.

CATALYST RESEARCH CORPORATION, MINE SAFETY APPLIANCES COMPANY, MILTON G. HULME, JR., GEORGE H. DEIKE, JR., JOHN W. CARVILLE, EUGENE W. MERRY, JOHN T. RYAN, JR., AND ELECTRONIC AIDS, INC., a Maryland Corporation, Appellees.

No. 72-1846

Filed March 1, 1973

WILLIAM K. SLATE, II, Clerk

Order

After careful consideration and with the concurrence of Judge Winter and Judge Field, the petition for rehearing is denied.

J. BRAXTON CRAVEN, JR.
United States Circuit Judge

A True Copy, TESTE:
WILLIAM K. SLATE, II, Clerk
By SHARON GRUBB
Deputy Clerk

EXCERPTS FROM TRANSCRIPT

* * * * * * * *

[60.]

ROLF TOPIK

DIRECT EXAMINATION

By Mr. Trent:

Q. Now, your Answer there refers to: "Since the proceedings resulted in an agreement, papers were not subsequently filed." I show you what is marked Exhibit T-8, it being a 3-page agreement dated September 4, 1970, and ask you if this is the agreement that was referred to (Handing papers to the witness)?

A. I think that is correct.

(The agreement, dated September 4, 1970, between Rolf Topik and Catalyst Research Corporation, referred to, was marked Exhibit T-8.)

Q. Now, you will notice there is nothing in that agreement about whether the shareholders of Electronic Aids could seek dissenters' rights under the Maryland Statute, is there, because it does not say anything about it one way or the other, does it?

A. No.

Q. Am I correct that the conference recognized that that right wasn't barred by this agreement, and any shareholder of Electronic Aids who wanted to do that, that is, seek dissenters' rights under the Maryland Statute, was free to do so?

A. As far as I know.

Excerpts From Transcript.

Q. Was there any other agreement not mentioned in this document, that has been marked Exhibit T-8? Frankly, I know of none, but I just want to make sure.

A. I don't believe so, no.

* * * * * * * *

[65] *By Mr. Trent*:

Q. Mr. Joy, you were appearing as counsel for Mr. Topik at the time that a meeting was held in Baltimore on September 4, 1970, in Judge Northrop's chambers, I believe. Is that correct?

A. Yes, sir.

Q. Mr. Topik has testified today concerning what happened at that meeting and, I believe stated that he had nothing to add to the summary as set forth in the Answer to Catalyst's Interrogatory number 16. According to your recollection of the meeting, is that summary correct?

A. Let me take a look at the summary to see if it is correct. I want to just take a moment.

(Thereupon the papers were handed to the witness.)

The Witness: It has been offered to me by Mr. Trent to take a look at just to make sure that it is complete, that everything that has been stated in there is correct.

Yes, I think this is complete. I do recollect making a reference to the shortness of the notice of the meeting. I helped in the preparation of the Answer here, and I was assisted by Mr. Topik. It gives the basis for the conclusion, for making the reference to the shortness of the calling of the meeting.

Excerpts From Transcript.

By Mr. Trent:

Q. You have nothing more to add to what has been said here today and to what happened at that meeting?

A. Just this, that I came away from the meeting with the belief that the status quo had been preserved, and that the decision to try and intervene, and not merely go under Maryland statute, was taken because we felt that should the Maryland statute be inadequate it would lose rights for the people, who were in this public class, that has been spoken of in Mr. Topik's testimony and in his Complaint.

Q. You agree with Mr. Topik's understanding that the execution of this agreement, Exhibit T-8, did not bar any shareholder from resorting to the Maryland statute, if they so desired?

A. That is correct.

I might say this, Mr. Trent, since you have asked for a complete statement on this. Mr. Neuberger, who was co- [66] counsel with us, made a point of saying at the end of the conference, this was at the conference and not before the Judge, when we were just finishing signing the document, that he wanted it to be very well understood that this would not be barring anybody from their rights under the Maryland statute. So, I am giving you an additional support for possible opposition you might want to take, in calling attention to that. I firmly believe myself that we were taking an action, which would have an effect on the Maryland statute and would not sustain your position, or however you might want to call it, against our people for not having taken advantage of it. We did this because

of the fact that not only the plaintiffs would be involved, but the other people, also. We were trying to get protection for the other people, too.

Mr. Trent: I don't quite understand that statement you made.

By Mr. Trent:

Q. You said that it was understood by everybody at the execution of the agreement, Exhibit T-8, that it did not bar any shareholder from proceeding under the Maryland statute, if they wanted to?

A. That is correct.

Q. That is right, is it?

A. Right.

Q. Now, except for that oral understanding, is there any agreement which is not contained in that document, Exhibit T-8?

A. Well, I consider that there was an implied agreement.

Q. Implied from the document you mean?

A. From the document and from the circumstances that the public shareholders, who did not go under the Maryland statute, would nevertheless not be barred by the Maryland statute from having their adjudication made in this particular action.

I might say this, too, that the particular agreement was drafted by Mr. Scriggins and, I believe it was, with the assistance of Mr. Neuberger, and I believe it set forth the understanding, but I wanted to make this point because I think it could be a matter, at some time, of judicial interpretation and it is important for the Court to know who actually entered into the agreement.